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12 June 2009
by express

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Hon. Anne Quinlan
Secretary
Surface Transportation Board
395 E Street SW
Washington, D.C. 20024

FILING FEE WAIVED

Re: Consolidated Rail Corporation - Abandonment Exemption - in Hudson County, NJ,
AB 167 (Sub-no. 1189X) and related proceedings
Fee Waiver Requested

AB-290 Sub 306X
AB-55 Sub 686X

Dear Secretary Quinlan:

Enclosed for filing on behalf of City of Jersey City please find a statement and protective appeal in connection with the Director's May 26 Decision in the above captioned proceeding. The language from which City of Jersey City appeals, or in the alternative seeks reconsideration, may simply be dicta which the Board can address at a later time. However, since City views the May 26 Decision as incorrectly stating the law, the City wishes to preserve all its rights.

To the extent that a fee is ordinarily due, City notes that under 49 C.F.R. 1002.2(e)(1) filing fees are waived for government filings. The regulation states that "[f]iling fees are waived" for applications filed, inter alia, by local government entities. City is such an entity. Any filing fee, if applicable, for the kind of "reconsideration" sought by the City should be waived. In any event, the Board has discretion to waive any fee under 49 C.F.R. 1002.2(e)(2). City requests such discretionary waiver. The Director's Decision insofar as the City seeks to appeal it is extremely unusual in that it imposes requirements never before imposed on a governmental entity seeking to OFA a line.

Respectfully submitted,

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for City of Jersey City
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cc. per certificate of service

BEFORE THE SURFACE TRANSPORTATION BOARD

CONSOLIDATED RAIL CORPORATION - ABANDONMENT EXEMPTION - IN HUDSON COUNTY, NJ	)	AB 167 (Sub-no. 1189X)

STATEMENT
of CITY OF JERSEY CITY
in response to
TOLLING OF OFA TIME PERIOD
and
PROTECTIVE APPEAL

City of Jersey City ("City") welcomes the Director's Decision of May 26, 2009, in the above proceeding tolling the time period for submitting an OFA until ten days after applicant for abandonment Consolidated Rail Corporation ("Conrail") furnishes the information specified in 49 C.F.R. 1152.27(a).[1] City does not appeal from the Decision insofar as it tolls the time period for submitting an OFA.

However, in addition to tolling the time period for filing an OFA, the Director's Decision purports to require "any part[y]" making an OFA to address three issues:

> "whether there is a demonstrable commercial need for rail service, as manifest by support from shippers or receivers on the line, or as manifested by other evidence of immediate and significant commercial need; whether there is community support for rail service; and whether rail service is operationally feasible."

May 26, 2009 Decision at p. 3. While the Decision arguably does

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[1] Conrail still has not provided any responsive information or indicated when it will do so.

not directly state that an OFA party must make each showing successfully in the opinion of the Director (or Board), the Director presumably would not impose the requirement to submit such evidence if something along those lines was not the Director's intent. To the extent the Director intends by the Decision to state the law that will govern this proceeding as to any OFA filed by the City, City objects that the Director's Decision as to the City not only fails to correctly state the law, but also in fact is contrary to the law.

The agency's general rule is that OFA's are allowed to go forward so long as made by a financially responsible party (which a city is presumed to be). Thus, even where the railroad right of way is needed for public use by a state or local government, this Board in most instances allows the OFA without any special showings. In the words of this Board,

> "Exemption from the OFA provisions of section 10904 are only rarely granted (i.e., there must be a compelling need to use the property for a valid public purposes and no overriding public need for continued rail use). See, e.g., Norfolk and Western Railway Company - Abandonment Exemption - in Cincinnati, Hamilton County, OH, STB Docket No. AB 290 (Sub-no. 184X)(STB served May 12, 1998) and cases cited there at p. 11."

Sea Lion Railroad - Abandonment Exemption - in King County, WA, AB 544X, served Aug. 11, 1998, at pp. 6-7.

The City desires to make its OFA in a lawful fashion without

some special burden imposed contrary to relevant STB precedent. In order to ensure that the City does not forego any rights in this important case as a consequence of the unprecedented demands in the Director's May 26 Decision, City accordingly makes this protective appeal in accordance with 49 C.F.R. 1115.2. Under section 1115.2, a Director Decision may be appealed for any one or more of a number of reasons, including failure to make necessary findings of fact, making erroneous findings, or unsupported findings or conclusions, or reaching legal conclusions that are contrary to precedent and law, or that reach conclusions on important matters for which there is no precedent.

The referenced language at p. 3 of the May 26 Decision is not based on necessary findings of fact, and is erroneous and unsupported in that respect [id. 1115.2(b)(1)]. In addition, the referenced dicta state legal conclusions that are contrary to law, Board precedent, or policy [id. 1115.2(b)(2)]. Alternatively, important questions of law are involved which are without governing precedent [id. 1115.2(b)(3)].

While we believe an appeal as of right is applicable here, to the extent the p. 3 language was not part of an initial decision to which an appeal of right is appropriate, then City petitions for partial reconsideration on grounds of material error. 49 C.F.R. 1115.3.

1. Decision below. Nothing in the OFA statute, 49 U.S.C. 10904 provides that it may only be used to preserve rail lines for freight rail purposes. City, however, acknowledges that

there is ICC and STB precedent that the OFA provision may not be used solely to advance passenger rail or non-rail objectives. More important, section 10904 envisions non-abandonment of the freight common carrier obligation, so of course that obligation would transfer to a successful OFA applicant. Thus, the objectives of the party making an OFA must include continued or restored discharge of freight common carrier duties on a line. City accordingly has no objection to the notion that an OFA must be to provide rail service, which includes freight rail service.

For this reason, the City generally does not object to language at the beginning of the paragraph at the bottom of p. 2 of the Decision stating that the OFA process "is designed for the purpose of providing continued rail service," but only so long as the word "continued" is also understood to include restoration of service. The OFA remedy, after all, is generally available in two year out- of-service abandonments like the one at bar. By definition in such cases, there has been no local rail service on such lines for at least two years. It follows that any OFA would be to restore service, not to continue something that already exists.

The City's objection to the May 26 Decision really commences with the statement in the Decision that "[t]he Board need not require the sale of a line under the OFA provisions if it determines that the offeror is not genuinely interested in providing rail service or that there is no likelihood of future traffic." This statement is misleading, and in and of itself,

an incorrect statement of the law. In essentially all cases so far cited by or to the Board, the does not examine offeror intent or likelihood of future traffic unless the rail right of way is needed for a legitimate non-freight rail public purpose. Only where the Board finds that the right of way is needed for a legitimate non-freight rail public purpose does it sometimes (by no means every time) then require a party making an OFA to show an intent to provide rail service, or to show that there is something more than "no likelihood" of future traffic.

For example, in the Roaring Fork case, cited by the Board in its footnote 5 for the proposition quoted, the Board did not find there was no likelihood of future traffic. The Board hinged its Decision on the proposition that if there was future traffic, the OFA party admitted it would be dependent on the government parties resisting the OFA for financial aid to serve that traffic. The Board thus found that the OFA would not contribute to preserving the line for rail use, because the OFA applicant basically proposed only to do for the government parties what the government parties were seeking to do for themselves. It followed that under the circumstances, there was no reason for the OFA.

2. Lack of essential finding. This leads us to our first grounds for appeal: the Director seems to be requiring a special showing by City that heretofore has only been required where the right of way will otherwise be devoted to a legitimate non-freight rail public use. The Director has not found that the

right of way, but for the City's OFA, will be devoted to a legitimate non-freight rail public use. The Director literally cannot make this key finding here. Conrail is seeking to avoid the OFA process not to foster a non-freight rail public use of the Harsimus Branch, but instead to secure the Branch for private for-profit destruction by Conrail's chosen developer. Conrail is clearly and undeniably trying to frustrate all legitimate public uses of the railroad right of way. Seen in this light, as it must be seen, the Director's Decision not only omits a key finding, but reaches an unsupportable legal conclusion, completely contrary to any applicable agency precedent. The Director is imposing requirements designed to protect legitimate alternative public uses of rights of way in a context where the Director is protecting illegitimate frustration of all public use.

3. Further objection. City also objects to the Decision in connection with the material following footnote 5 of the May 26 Decision, which renders the situation even worse. Citing Los Angeles County Metropolitan Transportation Authority - Abandonment Exemption - in Los Angeles County, CA, AB 409 (Sub-no. 5X), served June 16, 2008, the Board per the Director states that

> "[a]ny person who intends to file an OFA in this proceeding should address one or more of the following: whether there is a demonstrable commercial need for rail service, as manifested by support from shippers or receivers on the line

or as manifested by other evidence of immediate and significant commercial need; whether there is community support for rail service; and whether rail service is operationally feasible."

Although the Board's Decision does not state that it will only allow an OFA if the OFA applicant convinces the Board on those showings, additional statements in the Board's Decision seem to suggest that this may be the case for any OFA that is filed for a line out of service for two or more years. That in any event seems to be an implication of the parenthetical following the Los Angeles citation in the Decision. The quoted dicta are directly contrary to STB precedent. The agency generally allows OFA for out of service lines without any such showings, even when the line is otherwise sought for a legitimate public non-freight rail purpose. See Borough of Columbia v. STB, 342 F.3d 222 (3d Cir. 2003) (10 year out of service line sought for trail and park is OFA'd by adjoining business that states it intends to pursue new rail-dependent business opportunities). In Borough of Columbia, the OFA applicant obviously made no showings of any of the factors (support by community, urgent need, or feasibility) the Director purports to require of City, even though the line there was sought as a trail and park, and had not been used for over ten years.

We question what the Director means by "immediate and significant commercial need" in the context of a two year out of service abandonment at all. By definition the line has not been

used for at least two years. Many such lines have had switches, or, as here, structures removed such that restoration of service may take a year or more, especially given modern environmental and safety requirements, not to mention their application to a line in the middle of a developed urban area like Jersey City. Heretofore the only time STB has examined a record for a showing of such urgent and current need is in a few cases where a party asserts that the line is needed for a legitimate alternative public need. But, as noted, no party is raising that objection to City's pursuit of OFA here. The objecting party, Conrail, wants the special requirement in order to help its chosen developer devote the corridor to non-public purposes, and indeed to defeat all public purposes which preservation of the corridor by OFA would foster. In other words, STB in the past has required a showing of significant freight need only to override what it views as a significant public non-freight need. That is the opposite of the case here.

If the Director imposes such a requirement on Jersey City, the Director is changing precedent such that this new requirement must be imposed in all two year out of service exemptions. In other words, if Jersey City must make such showings even in the absence of non-freight public need, then all OFA parties in all 49 C.F.R. 1152.50 proceedings must do so in their cases as well, at least if the abandoning railroad so requests for whatever reason, or evidently for absolutely no reason except its internal convenience. This would mean, of course, that STB's actions in

cases like Borough of Columbia, supra, were in error.[2] If the Director on behalf of the agency intends to so change the law, the Director needs to give a reasoned explanation, and the Director has not done so here.

While City has focused on the legally erroneous nature of the "immediate and significant commercial need" requirement, we also note that no OFA applicant heretofore has ever been required to show that it has "community support" (although City is prepared to show that it in fact has community support). City can find no case in which STB rejects an OFA because the applicant has failed to show community support for the OFA. STB does not subject OFA's to some kind of beauty or talent show vote in order to proceed.

There is one case on first blush that appears to hold that a line so short that rail operations on it are not feasible is not eligible for OFA: the Los Angeles decision cited in the

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[2] The Director's formulation purporting to require a party seeking to invoke OFA on a two year out of service line to show an "immediate and significant need" all but precludes anyone from using the OFA provisions, under any circumstances, if "immediate" means a short time and "significant" means going out of business, or likely going out of business. After all, such lines have no current shippers, and according to a court that has upheld the two year out of service exemption, persons desiring rail service cannot presume that rail service will continue on them. See Illinois Commerce Commission v. ICC, 848 F.2d 1246, 1254 (D.C. Cir. 1988). When or how an "immediate and significant need" could be demonstrated on a two year out of service line is, to be blunt, extremely obscure. Yet STB customarily allows OFA on two year out of service abandonments [e.g., Borough of Columbia, supra (ten years of non-use, switch removed)] and heretofore has done so without requiring a demonstration like it is purporting to require here.

Director's May 26 Decision. Los Angeles involved an OFA by a Mr. Riffin which the Board found improper except as to a .08 mile length of rail line over which the Board indicated Union Pacific showed that rail operation was infeasible (not enough space), and where the adjoining landowner evidently did not want rail service. That case arguably does stand for the proposition that OFA's in the abstract are not permissible on minute segments of line insufficient to permit rail service. However, it does not address situations where the OFA party presumably shows that the segment in connection with other properties can constitute a feasible operation, nor with lines the size of the Harsimus Branch. Moreover, the Los Angeles decision is associated with Los Angeles County Metropolitan Transportation Authority (LACMTA) - Abandonment Exemption - in Los Angeles County, CA, AB 409 (Sub-no. 5X), served July 17, 2008 ("LACMTA"). These two cases involved essentially the same trackage (i.e., MP 485.69 to MP 486.0). In LACMTA, STB rejected another Riffin OFA, noting that LACMTA was exempt from abandonment regulation, including OFA, pursuant to a 1992 ICC decision. The agency also stated that even if LACMTA were not, STB would grant an OFA exemption if one were required. The agency explained that exemptions from OFA were granted "where the record shows that a right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service." Slip. op. 5. STB said that mass transit was "not only a valid public purpose but ... an important one" and that LACMTA required the property for that

purpose. Id. The Board indicated that Riffin had not produced any evidence showing a freight rail need for the little segment.

In short, STB in LACMTA and the related Los Angeles decision declared and applied the standard formula for granting exemptions: "where the record shows that a right of way is needed for a valid public purpose and there is no overriding public need for continued rail service" an exemption from OFA is appropriate. But as City has indicated, Conrail is not opposing OFA in order to foster an alternative public use of the Harsimus Branch; Conrail is opposing OFA in order to assist its chosen developer to defeat all public use of the Branch. The predicate for the requirements that the Director seeks to impose on Jersey City's OFA process is completely missing.

Since the Board's regulations provide that the financial responsibility of a public entity filing an OFA must be presumed, the operational feasibility of restoring rail service, including freight rail service, on the Harsimus Branch presumably must also be presumed. Reserving this objection, the City nonetheless is preparing to make a showing on feasibility.

In sum, any suggestion that the Board may condition the City's right to OFA the Harsimus Branch upon the City's showing some kind of urgent or overriding commercial need, or that the City has community support, or that the City's plan is operationally feasible is an error of fact and law, is contrary to precedent, policy and law; or in the alternative reaches out into an area where there is no precedent, and purports to extend

law where it should not go without more careful analysis, and a decision by the Board itself.

In the case of the Harsimus Branch, City's OFA will foster the public interest of preserving this rail corridor not just for rail service, both passenger and freight, but also for historic preservation purposes. The public interest, in other words, is served by the OFA, and is dis-served by any burden upon, or exemption from, the OFA process, as to the City's OFA.

In failing to consider the relevant facts, the Director omits key findings, ignores the fact that Conrail's objection to OFA is not based on an alternative public use for the right of way, and purports to impose requirements on the City never heretofore imposed on any OFA applicant under remotely similar circumstances. The Director's decision thus reaches the wrong conclusions. For these reasons, City's protective appeal should be granted.

4. Legal error. In addition, and as indicated, the Director's May 26 Decision errs in its statement of the law. As this Board's precedent uniformly indicates, the Board excludes OFA only in the face of a compelling public need, which is not surmounted by a public need for continued rail. LACMTA, supra. The test is essentially a balancing test. If the public need for alternative use is great, presumably the overriding public rail need must be very compelling. If the public need is, say, "just" for a trail or a park, the Board customarily accepts a reasoned statement that the party making the OFA seeks to acquire the line

for freight purposes. Borough of Columbia, supra. Under the law as it exists, the Director should not require any showing of the City, since Conrail does not advance any alternative public need in its opposition to OFA. In addition, Conrail itself is not a governmental entity, or quasi-governmental entity, but a railroad owned by two of the largest freight railroads in North America. Conrail's private interest in fostering its chosen private developer are not some kind of alternative public use that this Board must foster.[3]

Notwithstanding the above, City has already shown that it is seeking the line in order to address its need to relieve both freight and passenger traffic congestion on its highways. Reserving the City's objections, the City is preparing to make some further showings in this connection even though no more showings should be required for the City to successfully pursue its OFA remedy.

The Director cites no case in which it has ever required a governmental entity seeking to invoke the OFA remedy to make some special showing of rail need. Local governments heretofore have been treated as motivated buyers, much like an adjoining business. They are presumed to have an adequate rail intent in that they must assume and discharge the common carrier obligation

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[3] Conrail will receive constitutionally required compensation for any property interest it retains in the property; it thus sustains absolutely no legally significant harm from the OFA. Any losses it sustains to its dignity or otherwise are merely a consequence of government regulation of which it should have been aware, as explained by the Third Circuit to Shawnee Run Greenway's objections in the Borough of Columbia case.

on the line, may not discontinue service for at least two years, and may not transfer to another (except to the original railroad) for five years. 49 U.S.C. 10904(f)(4). This Board has an entire regulatory system (modified certificates of PCN) to encourage state and local governments to acquire rail lines in last ditch efforts to preserve them for freight rail use. 49 C.F.R. 1150.21, et seq. Seen in this light, the law as quoted in the Director's May 26 Decision is the reverse of what it has been to date.

City's protective appeal should be granted in light of the mistake of law, and indeed the material error, set forth in the May 26 Decision.

5. Legal error compounded. The tests that the Director seeks to impose are erroneous as applied here for the reasons stated, but they are suspect for an additional reason as well. The cases on which the Director relies all involve OFA's by private parties. None involve an OFA by a government. While it may be appropriate to require a private party to show some kind of "significant and immediate commercial need" in order to employ the OFA statute in certain circumstances, that is not the case in connection with a governmental entity. A government may seek to secure rights of way in order to foster a community benefit, like reduction of congestion by trucks which would otherwise be handling freight the government seeks to shift to rail. One of the customary activities of state and local governments (and the federal government for that matter), now and especially since the

Civil War, is to subsidize transportation systems, including their creation, maintenance, rehabilitation and restoration. This long-established governmental activity includes subsidization not just of roads, but of rail transportation systems, both passenger and freight, and passenger and freight combined. State and local governments do this to attract businesses, to relieve congestion, and to provide a modern living experience, to the extent that their taxpayers are willing to pay for it. This has little to do with responding to "immediate and significant need." The governmental planning process, let alone construction process, would only seldom be able to respond in a timely fashion if it could only be invoked for an "immediate and significant need," and governments frequently act not for simply commercial purposes but to foster less pollution and a better quality of life. Nothing in the OFA statute, or its implementing regulations, or its legislative history, restricts its use to situations where a government shows an "immediate and significant commercial need." STB should not seek to impose arbitrary values that go well beyond anything that Congress has stated in the statute or the relevant legislative history.

In any event, the Board's precedent favors the continued (or resumed) rail use even over a compelling public alternative use of rail property. Accord New York Cross Harbor Railroad v. STB, 374 F.3d 1177 (D.C. Cir. 2004) (reversing grant of adverse abandonment authority due to precedent favoring continued rail use); Borough of Columbia, supra (upholding OFA of 10 year out of

service line by adjoining business against alternative use for public park and trail).[4]

With the possible exception (we would argue it is not, because it was related to a public use) of the 0.08 mile infeasible OFA in Los Angeles, supra, this agency has never had a rule or case that imposes any special showing or requirement on an OFA applicant when the property is not needed for public use by a state or local government. The agency's general rule, even where the property is needed for public use by a state or local government, is to allow the OFA without any special showings. City reiterates that standard statement of this Board that

> "[e]xemption from the OFA provisions of section 10904 are only rarely granted (i.e., there must be a compelling need to use the property for a valid public purposes and no overriding public need for continued rail use). See, e.g., Norfolk and Western Railway Company - Abandonment Exemption - in Cincinnati, Hamilton County, OH, STB Docket No. AB 290 (Sub-no. 184X)(STB served May 12, 1998) and cases cited there at p. 11."

Sea Lion Railroad - Abandonment Exemption - in King County, WA, AB 544X, served Aug. 11, 1998, at pp. 6-7. None of the cases cited in the May 26 Decision are to the contrary. In short, under this Board's precedent, the duty is not on the OFA applicant to show something called an "immediate and significant

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[4] Indeed, the May 26 Decision at p. 3 appears to ignore all the rail policies discussed in the Cross Harbor case as grounds for reversal.

commercial need" as set forth in the May 26 Decision. The duty is on the party seeking rejection of the OFA process to show a "compelling public need" for the property that is inconsistent with the OFA, and to further demonstrate that this is not overridden by the public need for rail service. The Director has mistakenly reversed this formulation.

Since City is not seeking to acquire the property in the face of a contrary public need, it should not have to make any showings at all under existing precedent. The Board should simply allow the OFA to take its normal course.

Without waiver of the above arguments, City has shown that it wants the Branch for continued rail, including continued freight rail, purposes. City intends to do so again when City makes its OFA. However, the May 26 Decision misstates the law, and the City accordingly appeals from this misstatement to protect and to preserve its position that it need not make some special showing of need, or beauty, or feasibility as suggested in the Director's Decision. The May 26 Decision misstates the law by omitting the key finding that the OFA somehow is contrary to an alternative public need for the right of way. In the alternative, the May 26 extends the law in an unprecedented direction, and this constitutes another grounds on which to appeal, pursuant to 49 C.F.R. 1115.2(b)(3).

By now this is beating a dead horse, but City notes again that Conrail's opposition to OFA flows from a desire to break up the rail line and to forestall public use. Conrail does not seek

to advance any public use, but to defeat it. Conrail seeks to secure the corridor for destruction by Conrail's chosen developer, to whom Conrail unlawfully sold the property prior to seeking, much less obtaining, an effective abandonment authorization from this Board, and in order to thwart all public remedies and effective environmental review in connection with the line at issue. There is no public policy, and certainly no rail transportation policy, served by fostering Conrail's effort to assist the developer to whom it unlawfully sold the property. This Board has elsewhere indicated that the purpose of the OFA statute is to preserve rail corridor for rail use wherever possible. City's OFA serves that purpose. Conrail's purpose does not. The Director's Decision at p. 3 overlooks all these points.

Jersey City itself is invoking the OFA remedy, not opposing it. City has indicated both freight and light rail interests, and also compatible interests in park, trail, and historic preservation uses. At least some of these interests, and certainly the rail interests and historic preservation, will be served by the City's OFA. The City is thus well motivated. The Embankment Preservation Coalition, representing the adjoining neighborhoods and public interest organizations, has indicated support. As indicated in prior filings, the City finds it exciting to have achieved an apparent community consensus in favor of preservation of the property consistent with its OFA.

City certainly has no objection to this Board's requiring

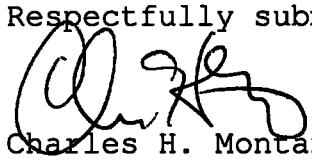
any private party seeking to file an OFA to demonstrate financial capacity not simply to acquire the line, but to restore it. The City's financial capacity is presumed under this Board's regulations. The City candidly does not believe restoration possible absent governmental financial assistance, which in the event its OFA is successful it is prepared to arrange.

Conclusion

To the extent the May 26 Decision's statement at p. 3 was intended to be law of the case, City of Jersey City for the reasons above appeals, or in the alternative petitions for reconsideration, on the ground that the legal requirements that the May 26 Decision states ignore relevant facts, misstate the law, are contrary to precedent and policy, and are materially in error.

City believes the issues tendered in this partial appeal may best be resolved at such time as it tenders an OFA and makes showings and arguments responsive to this Board's May 26 Decision. However, City by this Protective Appeal wishes to preserve all its rights to contest the May 26 Decision insofar as the material at p. 3 of that Decision is intended to state applicable law.

Respectfully submitted,



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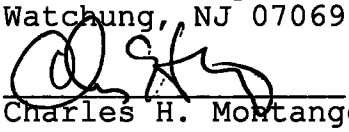
Certificate of Service

I hereby certify service of the foregoing on 12 June 2009 by deposit for express (next business day) delivery addressed to Robert Jenkins III, Mayer Brown, 1909 K Street, NW, Washington, D.C. 20006 (for Conrail) and Eric Strohmeyer, CNJ Rail Corporation, 81 Century Lane, Watchung, NJ 07069.



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